an action for an injunction in the United Kingdom by the Attorney-General at the relation of the local authority (see *Attorney-General* v. *Bastow.*[1]

Section 3(1) of the Civil Law Ordinance, 1956, requires the courts *inter alia* to "apply the common law of England at the date of the coming into force of this Ordinance", that is, on 7th April, 1956. It therefore follows that before Merdeka Day the English common law power of the Attorney-General to bring a relator action is vested in him. Section 3 is an existing law within the meaning of article 160. Article 162 provides *inter alia* that the existing laws, until repealed by the proper authority, continue to be in force on or after Merdeka Day. That article therefore preserves the provisions of section 3 of the Civil Law Ordinance and section 3 is a written law which confers on the Attorney-General the English common law power to bring a relator action.

Mr. Yong Pung How on behalf of the plaintiff supports his claim that the Attorney-General in this country can bring a relator action to remedy a public wrong by referring to O. 16, r. 20 of the Rules of the Supreme Court which provides:—

"Before the name of any person shall be used in any action as next friend of any infant, or other party, or as relator, such person shall sign a consent to act as such next friend and such consent shall be filed".

He contends that these Rules of the Supreme Court, although made before Merdeka Day, came into force after Merdeka Day and therefore the reference in the rules to relator actions provides confirmation from an authoritative source that such actions continue to exist. I find the argument attractive and well-founded.

It is now convenient to deal with the second limb of Mr. Ng Ek Teong's objection, that is, the Attorney-General is not the proper person to institute the proceedings. He paraphrased his argument by saying, firstly, for the consent of the relator to be valid it must be filed at the time of filing the writ. My attention was drawn to O. 16, r. 20 (U.K.) and to the *Annual Practice* 1956 at page 272 which states:—

"On issuing a writ of summons or originating summons the authority is filed at the action department at the time of issue or filing".

In the instant case the writ was filed on 18th February, 1967 but the consent of the relator was filed on 29th March, 1967. Our O. 16, r. 20 states that "such consent shall be filed" but does not stipulate the period of filing. The English provision too does not stipulate the period of filing but the *Annual Practice, supra,* and the 2nd edition *Atkin's* Court Forms, Vol. 3, p. 24, seem to indicate that the authorisation must be filed in the registry at or before the writ or originating summons is issued. Secondly, it is submitted that since the Pesurohjaya, Ibu Kota, is a corporation sole, his consent must be under seal. In this connection reference was also made to the *Annual Practice* and *Atkin's* Court Forms.

Mr. Yong Pung How, on the other hand, contends that as these procedural defects do not go to the root of the matter they can be cured and accordingly they cannot constitute a ground for setting aside a writ which has been properly founded.

I cannot subscribe to that view. It seems to me in order to give validity to the use of the relator's name in an action his prior written consent to act as such must be filed at or before issue of the writ. Such consent is a condition precedent to the right to use the relator's name; it goes to the root of the matter for without it the nominal plaintiff has no *locus standi.*

The Pesurohjaya, Ibu Kota, is a corporation sole (see section 4(1) Federal Capital Act 1960). His powers are derived solely from statute. He has an official seal which shall be authenticated by his signature (see section 4(2)) and any document purporting to be issued or made by him duly sealed and authenticated shall in any litigation or proceeding be deemed to be so made or issued without further proof, unless the contrary is shown. It seems to me plain that the section is imperative and not subject to any implied exception. Thus the Pesurohjaya in the circumstances must use his seal in the prescribed manner when giving his consent, the absence of which makes it inoperative and of no effect.

The application is therefore allowed with costs.

Application allowed.

Solicitors: *Shook Lin & Bok; Braddell & Ramani.*

CHEE KUAN CHENG v. CHUO KONG KAH

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) and Ong Hock Thye F.J.) April 12, 1967]

[K.L. — Federal Court Civil Appeal No. X.69 of 1966]

Practice and Procedure — Settlement — Consent order agreed to by counsel — Application to set aside before drawn up and entered — Whether consent given under misapprehension or misstatement of facts — Whether terms were fair or unjust.

The appellant was the defendant in a partnership action. On the second day of the trial settlement was reached between counsel on the terms agreed to by both parties. Counsel then attended the judge in chambers for an order by consent. The parties themselves did not accompany counsel into chambers when the order was made. Immediately afterwards the plaintiff repented of it and gave notice to the solicitors for the defendant and the senior assistant registrar that the order should not be drawn up or entered. The plaintiff then made an application to set aside the order contending that he had given his consent under a misapprehension. The learned trial judge after hearing argument felt it "difficult to avoid the conclusion that there might have been some

misapprehension on the part of the counsel as to some particular matters which form part of the basis of settlement". He accordingly set aside the order and restored the action for trial with costs against the plaintiff in any event ([1967] 1 M.L.J. 147). Against such order the defendant appealed.

Held: as the plaintiff fully understood the terms of the settlement and agreed thereto and neither the plaintiff nor his counsel was under any misapprehension as to any of the terms agreed upon which were embodied in the consent order the consent was not given under a misapprehension or from a misstatement or want of materials. Further, the terms of the settlement were not only fair but of practical advantage to the appellant.

Cases referred to:—

(1) *In re Harrison's Settlement* [1955] 1 All E.R. 185; [1955] 3 W.L.R. 156.

(2) *Neale* v. *Gordon-Lennox* [1902] A.C. 465, 470.

(3) *Dietz* v. *Lenning Chemicals Ltd.* [1966] 2 All E.R. 962, 964; [1966] 1 W.L.R. 1349, 1352.

(4) *Matthews* v. *Munster* [1886-90] All E.R. Rep. 251, 254.

FEDERAL COURT.

Morris Edgar for the appellant.

Peter Yeo for the respondent.

Ong Hock Thye F.J.: This is an appeal against the judgment of Raja Azlan Shah J., which was reported in [1967] 1 M.L.J. 147.

The appellant was the defendant in a partnership action. On the second day of the trial, settlement was reached between counsel on terms agreed to by both parties. Counsel then attended the judge in chambers for an order by consent. The parties themselves did not accompany counsel into chambers when the order was made. Immediately afterwards the plaintiff repented of it and gave notice to the solicitors for the defendant and the senior assistant registrar that the order should not be drawn up or entered.

Upon an application by the plaintiff to set aside the order, it was argued that he had given his consent under a misapprehension. After hearing argument the learned judge felt it "difficult to avoid the conclusion that there might have been some misapprehension on the part of counsel as to some particular matters which form part of the basis of settlement." He accordingly set aside the order and restored the action for trial, with costs against the plaintiff in any event. Against such order the defendant appealed. We allowed the appeal and now proceed to state the grounds of our decision.

Upon perusal of the record, before hearing counsel, I was at first of the opinion that the learned trial judge was right. A partnership action is often a very complex and difficult matter. Where, as in the instant case, the statement of claim ran to six pages and the defence to three, and the matters in dispute extended over a period of nine years before action, it seemed to me that an ordinary layman (who in this case knows no English and may even be illiterate), upon being faced with a sudden decision, could well have had little chance for reflection or careful consideration before saying aye or nay. In any event, he took no time at all to repudiate.

Moreover, the order had not been drawn up and entered. Until an order is perfected the court's jurisdiction to review the subject matter and to recall an order pronounced is undoubtedly a matter of wide discretion: see *In re Harrison's Settlement.*(1)

As to the exercise of such discretion — remembering that the plaintiff was ordered to pay all costs thrown away — the following *dicta* by the Earl of Halsbury L.C. in *Neale* v. *Gordon-Lennox* (2) would seem apposite:—

> "It has been said in such and such a case the parties were present in court and did not immediately repudiate the transaction, and therefore we are not satisfied that they did not consent. Those are all examples of what, in the exercise of its discretion, a court might or might not do because it was or was not satisfied that the circumstances of the case did not justify the undoing of a bargain which had been made. And I can well adopt, and feel that I could safely affirm, every one of the decisions referred to. But when I come to this case and consider the question of what should be the position of the other party who has acted upon the apparent authority of counsel, there are cases in which the court undoubtedly, in the exercise of its discretion (and that is the observation which I intended to make), might well say, 'If it is only a question of money, if it is only a question which costs will rectify, this matter can be put right by the payment of costs'."

Upon further consideration, however, I am satisfied that my original view was wrong. Payment of costs alone does not entitle a litigant to undo a bargain unless there are circumstances to justify such a course. This is clear from the judgment just quoted. The main ground of appeal here is that neither the plaintiff nor counsel on his behalf was under any misapprehension as to any of the terms agreed upon which were embodied in the consent order.

That this is true follows from the admission of counsel for the respondent, that the facts set out in the affidavit of counsel appearing for the plaintiff in the action could not be disputed. What the plaintiff really objected to in the bargain was having to part with his interest in the theatre premises and the acceptance of $20,000, instead of at least $24,000, as his share of the profits. This is apparent from a perusal of paragraph 5 of his affidavit, stating the grounds of his dissatisfaction, for which see page 148 of the report in [1967] 1 M.L.J.

What is equally clear, moreover, is that he had fully understood the terms of settlement and agreed thereto. Having had second thoughts, it would seem that he was minded to drive a harder bargain. That was the real ground of his application for setting aside the order. Such being the case, I agree with the learned judge

that the principles applicable are as restated by Lord Denning in *Dietz* v. *Lenning Chemicals Ltd.*,[3] but, with the utmost respect, I do not think that the consent in any way appeared to have been "given under a misapprehension or from a misstatement or want of materials". On this point, going a step further, I would quote Fry L.J. in *Matthews* v. *Munster* [4]:—

"In the compromise itself there is nothing that is outside the case, nothing which is unjust, or which shocks the conscience of the court, and nothing in the nature of a slip."

The terms of the bargain were not only fair, but indeed, of practical advantage to the appellant — if he has the sense to see it — because he ought to realise that, were the action to take its normal course, with accounts and inquiries etc., it is most unlikely that he will see the colour of the money he had invested, or even a portion of it, before 1970, while the costs of the action keep mounting in the meantime.

I would allow this appeal, set aside the order appealed against and affirm the consent order made on June 1, 1966. Costs of the motion and of this appeal to the appellant; the deposit in court to be refunded to the appellant.

Barakbah L.P. and **Azmi C.J. (Malaya)** concurred.

Appeal allowed.

Solicitors: *Morris Edgar & Co.; Heng, Chen & Co.*

ALI BIN HASSAN v. PUBLIC PROSECUTOR

[A.Cr.J. (Ali J.) April 12, 1967]

[J.B. — Criminal Appeal No. 8 of 1966]

Road Traffic — Using car as public service vehicle without valid licence — Using car without there being in force a policy of insurance in respect of 3rd party risks — Road Traffic Ordinance, 1958, ss. 74(1) & 92(1).

Evidence — Police observation over motor vehicles suspected of being used contrary to section 92(1) of Road Traffic Ordinance, 1958 — Admissibility — Evidence Ordinance, 1950, s. 15 — Road Traffic Ordinance, 1958, s. 144.

Criminal Law and Procedure — Charge — Trial — Separate.

The appellant was convicted on charges alleging: (1) he had used motor car SK 8626 as a public service vehicle without a valid licence contrary to the provisions of section 92(1) of the Road Traffic Ordinance, and (2) he used the said car without there being in force a policy of insurance in respect of third party risks, an offence under section 74(1) of the same Ordinance. He was fined and disqualified from holding or obtaining a licence for a period of 12 months and the car was confiscated. At the trial the prosecution led evidence to establish that on not less than 30 occasions from December 14 to 18, 1965 the appellant was observed by police to have been using the same car for the conveyance of passengers of different racial origins. On December 19 he was stopped by the police at a road block and in the car beside him were three other passengers. The allegation in the first charge was concerned only with what occurred on December 19.

Held: (1) the repeated acts of conveying passengers on various occasions prior to the date material to the charge was irrelevant and inadmissible. *Abdul Hamid v. Public Prosecutor* [1] and *Darus* v. *Public Prosecutor* [2] not followed;

(2) on the facts, in this case there was sufficient foundation for invoking the appropriate presumption under section 144 of the Road Traffic Ordinance;

(3) in cases where the evidence available renders it unnecessary to rely on the presumption there can be no objection to having both charges tried together at the same trial. In such an event the conviction for an offence under section 92(1) of the Road Traffic Ordinance would automatically lead to the conviction on a charge under section 74(1). Where it became necessary because of insufficient evidence to rely on the presumption it would be improper to have the charge under section 74(1) tried at the same trial.

Observations on requirement for a separate charge and a separate trial.

Cases referred to:—

(1) *Abdul Hamid* v. *Public Prosecutor* [1962] M.L.J. 44.

(2) *Darus* v. *Public Prosecutor* [1964] M.L.J. 146.

(3) *Makin* v. *Attorney-General of New South Wales* [1894] A.C. 57.

(4) *Harris* v. *Director of Public Prosecutions* [1952] A.C. 695.

CRIMINAL APPEAL.

C. N. Mendis for the appellant.

Tunku Zaid bin Tunku Zakaria (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Ali J.: This is an appeal against conviction and sentence imposed by the magistrate at Pontian for offences under the Road Traffic Ordinance No. 49 of 1958. Three charges were originally preferred against the appellant but one of these, the 2nd charge, was withdrawn. The 1st charge alleged that the appellant had used motor car SK 8626 as a public service vehicle without a valid licence contrary to the provisions of section 92(1) of the Ordinance, and in the 3rd charge the allegation was that he used the said car without there being in force a policy of insurance in respect of third party risks, an offence under section 74(1) of the same Ordinance. He was convicted on both charges and was sentenced to a fine of $300 on each charge and in addition there was an order disqualifying him from holding or obtaining a licence for a period of 12 months. The car was also ordered to be forfeited.

At the trial the prosecution led evidence to establish that on not less than 30 occasions from the 14th to the 18th of December, 1965, the appellant was observed by the police to have been using the same car for the conveyance of passengers of different racial origins. On the 19th he was stopped by the police at a road block and in the car beside him were 3 other passengers — a Malay woman, a Chinese woman and a Chinese man. The allegation in the 1st charge was, however, concerned only with what occurred